OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
FOR
MONTGOMERY COUNTY, MARYLAND

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APPLICATION NO. H-119

ORDER GRANTING REQUEST TO BE MADE A PARTY, EXTENDING THE TIME FOR CLOSE OF THE RECORD, DENYING THE APPLICANT'S MOTION FOR RECONSIDERATION, AND CONTINUING THE PUBLIC HEARING

The above-captioned case is an application filed by Francoise M. Carrier, Attorney for Applicant, Nichols Development Company LLC, requesting rezoning from the R-90 and CRT Zones to the TF-10.0 Zone for properties located at 100 Olney Sandy Spring Road, 12 Olney Sandy Spring Road, and 17825 Porter Road, all in Ashton, Maryland, consisting of a total of 2.574 acres in the 8th Election District (collectively, "subject property or property.") The tax account numbers for the property are 08-00720560, 08-00711190, 08-00720558, 08-00711202, 08-00720718.

Background

On May 1, 2017, the Office of Zoning and Administrative Hearings (OZAH) issued a notice scheduling a hearing in the above-captioned case for Monday, June 12, 2017. The hearing proceeded as scheduled and the Hearing Examiner left the record open until July 5, 2017, to receive comments from Staff on whether the Applicant's evidence at the public hearing addressed Planning Staff's statement that there was no justification for the development's encroachment into the stream valley buffer. Exhibits 23, 36.5. Two individuals, Mr. and Mrs. F. Meyer, appeared to oppose the application, and testified very briefly that they were concerned about the impact of stormwater from the subject property on their property, which is adjacent to the south. 6/12/17 T. 62.

On June 20, 2017, Mrs. Nancy Fennell notified OZAH that no sign advertising the public hearing was posted at the property as of that date. She reported that she was not aware of the public hearing until she read of it in a newspaper. She submitted photographs of the property from June 16, 2017, showing the property's frontage without the required sign. Exhibit 41. OZAH Staff received approximately five additional calls from individuals complaining that they were unaware of the hearing date because no sign had been posted. Exhibit 44. On June 30, 2017, OZAH received an e-mail from a member of the Board of Directors of the Spring Lawn Farm community association indicating that it did not know of the public hearing. Exhibit 58.

After correspondence with Mrs. Fennell, she and her husband requested that they be made parties to the case under OZAH Rule 3.1. Exhibit 44. They submitted their concerns in writing, which related to whether the proposed rezoning conformed to the *Sandy Spring/Ashton Master Plan* and the traffic impact of the proposed development. Exhibit 40. T. 62. In a subsequent letter, they posited that their concerns had not been addressed by other parties to the case, who had limited their opposition to the impact of stormwater management on adjacent property. Exhibit 43, T. 72.

In a letter dated June 23, 2017, the Applicant responded, stating that the signs had been posted on a "substantially continuous basis." Exhibit 49. In support of this, the Applicant submitted an affidavit from its property manager attesting that the signs had been posted as of February 23, 2017, and on unspecified dates when he visited the property "several times." Exhibit 49(a). According to the affidavit, one of those times occurred on June 12, 2017, at which time he remembered seeing three signs posted on Porter Road, but did not recall whether a sign was posted along the property's frontage on Route 108. After being notified that the signs were down, he visited the site on June 21, 2017, and found that all four signs "had been removed." *Id.* Two signs were stacked on the property and two were missing. *Id.*

The Applicant also submitted an unsworn letter signed by Missy Willson, who stated that she lives "directly across Porter Road from the old Sol D'Italia site." Exhibit 49(c). According to her, the signs "have been taken down several times" since they were originally placed. She further stated that, "[e]ach time, I have put them back up within a short time." *Id.*

The Applicant argues that the Fennells were not entitled to become a party to the case after the public hearing had occurred. In support, they state that the Fennells provided no explanation why they should be made parties to the case. *Id.*

The Hearing Examiner advised the parties that she had made a preliminary determination that a new hearing was necessary and that she would grant Mr. and Mrs. Fennell's request to be made a party to the case, but that a final order would be issued once the dates for the new hearing were set. She also advised of two potential dates for the additional hearing, September 11 and September 15, 2017. Exhibit 51.

The following day, the Applicant filed a "Motion for Reconsideration." Exhibit 53. It argues that the Fennells, who pass by the site, had "ample opportunity" to see the signs in the four months since they had originally been posted because posting was on a "substantially continuous basis." Exhibit 53(a). It also alleged that the Fennells had shown "little interest" in the rezoning in the past because they did not attend a meeting with the Applicant specifically for residents of Hidden Garden Lane, where the Fennells live. *Id.*

Alternatively, the Applicant argues that, even if the Fennells are admitted as parties to the case, an additional hearing is unnecessary and unfairly prejudices the Applicant. The Applicant argues that the Fennells did not specifically request a new hearing and had the opportunity to submit their views in writing. According to the Applicant, changes to the Floating Zone Plan at this stage will not affect the use, density, building type, traffic generation or "any other features related to compatibility or the applicable master plan." *Id.* The Applicant also argues that a

hearing date in September, 2017, could mean that a final decision will not be made until the Council returns from its Christmas recess. Thus, according to the Applicant, a continued hearing should be scheduled in July because "the interested parties have been identified and can asked their availability in July." *Id.*

Opinion

The Hearing Examiner grants the Fennells request to be made a party to the proceedings, extends the time for close of the record, and will schedule additional hearing for the following reasons.

1. The Fennells' Request to be Made a Party

OZAH Rule 3.1 outlines when individuals may be made parties to a hearing without testifying at the public hearing:

> a) Under these Rules, "parties of record" include applicants for a zoning action or a conditional use, individuals and organizations testifying at an OZAH public hearing and those who have requested and have been approved by the Hearing Examiner to be parties of record. Anyone may testify at the OZAH public hearing and will be automatically considered a party of record. Testifying before the Planning Board or other agency will not make a person a party of record to an OZAH proceeding.
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> b) Persons who do not wish to testify may request to be classified as a party of record by filing a written request, signed by the individual or an authorized agency, and demonstrating that other parties of record will not adequately represent the interests of the person or organization seeking to become a party of record.
>
> c) All parties of record must provide contact information, including an address, telephone number, and e-mail address.
>
> d) Being designated or not designated as a party of record as defined in these Rules does not determine a person's right to appeal to the courts or to request oral argument before the Council or the Board of Appeals. The person's right to appeal or request oral argument is governed by the Zoning Ordinance and by state law.

In contrast, OZAH Rule 3.2 provides that individuals who submit only letters or written documentation, without being made a party or testifying at the public hearing, are "participants" in the proceeding. Participants may submit letters stating their positions on a particular case, but will not be notified of case proceedings. In addition, concerns raised by participants (i.e., solely in writing) are given less weight. OZAH Rule 3.2(d) states:

> Signed, written comments timely submitted to OZAH by participants will be considered in evaluating the case, but not necessarily given the same weight as

statements that are made under oath and subjected to cross-examination at the hearing.

The Hearing Examiner finds that Mr. and Mrs. Fennell meet the criteria to be made a party under OZAH Rule 3.1. The only (very brief) testimony from the Meyers at the June 12th hearing concerned the possible impact of stormwater from the development on their adjacent property. 6/12/17 T. 62. The Fennells raise concerns about entirely different potential impacts of the development on traffic and compliance with the Master Plan. There is no guarantee that Mr. and Mrs. Meyer would adequately represent the Fennells' concerns.

2. Additional Hearing Date/Extension of Time to Close the Record

Section 59-7.5.1 of the *2014 Montgomery County Zoning Ordinance* establishes the notice required for different types of applications. For Local Map Amendment applications, the Ordinance requires three types of notice: (1) the Applicant must post a sign with information about the application at specified locations on the property, (2) OZAH must mail notice of the public hearing at least 30 days in advance of the hearing to certain entities, and (3) OZAH must post the application on its website. *Id.; Zoning Ordinance,* §59-7.5.2.C. The sign must contain the number of the application, the name of the applicant, the zone applied for, and contact information for OZAH so that individuals may call and receive information regarding the application. *Id.* §59-7.5.2.C.3. Written notice of the date of the public hearing is sent only to individuals whose properties abut or confront the subject property and civic, condominium and renters' associations within ½ mile of the subject property. Thus, the posted sign is the primary notice given to members of the public who may not be entitled to written notice of the public hearing. The Zoning Ordinance provides that the "notice requirements are the minimum necessary to ensure appropriate notice for communities affected by an application." *Id.,* §59-7.5.2.

The Applicant argues that the signs have been posted on a "substantially continuous basis." The Applicant has submitted two items to support this: a sworn affidavit from the project manager attesting that all four signs were posted on February 23, 2017, and three signs (but not the sign on Md. Rte. 108) were confirmed posted on June 12, 2017. Other than those two specific dates, the manager states that he was at the site "several times," at which times the signs were posted. Exhibit 49(b).

The Applicant also submitted an unsworn letter from a neighboring property owner, Missy Willson that acknowledges that the signs had been taken down "several times." She asserts, however, that she had put them back up "within a short time." Exhibit 49(c).

Aside from a few specific dates, both statements are vague in terms of how often and for how long the signs were actually posted. Based on this evidence, the Hearing Examiner cannot find that the signs were posted on a substantially continuous basis. While there is no indication that the omission was intentional on the part of the Applicant, the Zoning Ordinance mandates that the signs be posted on the property while the application is pending and that the notice required is the "minimum" appropriate to notify the community. *Zoning Ordinance*, Section 59-7.5.2; *see also*, *Baker v. Montgomery County Council*, 241 Md. 178, 184, 215 A.2d 831, 834 (1966). For those not entitled to written notice of the public hearing, the sign is the primary method of

informing the public that an application is pending. Given that the signs have been down more than once for undetermined periods of time, the Hearing Examiner must grant another hearing.

In its Motion for Reconsideration, the Applicant argues that the Fennell's correspondence indicates that they frequently pass the subject property and therefore should have seen the sign at one of the times it was posted. This argument assumes that the signs were posted on a "substantially continuously" basis, a proposition that is necessarily not supported by the information submitted. It also argues that the Fennells were not interested in the application because they failed to show up at a community meeting about the application specifically for residents of Hidden Garden Lane. This is speculative, as there could be a myriad of reasons why the Fennells did not attend the meeting.

Finally, the Applicant's Motion for Reconsideration states that another hearing date should not be required because the Fennells already submitted their comments on the application in writing. Reliance solely on the written submission is prejudicial to the Fennells, however, as that evidence is entitled to less weight because it is not subject to cross-examination.

Moreover, lack of notice in this case is not limited simply to the Fennells. As noted above, the purpose of posting signs is notice to the *public* that the application is pending. The record reflects that OZAH has received approximately five phone calls from individuals stating that they did not see the signs posted as well as an e-mail from a member of the Board of Directors of the Spring Lawn Farms Association indicating that they were unaware of the date as well.[1]

Based on the above, the Hearing Examiner holds that an additional hearing is warranted in this case. Because the record currently closes on July 5, 2017, the Hearing Examiner will extend the close of the record to a date set at the continued public hearing.

3. Additional Hearing Date

The next question, then, becomes the scheduling for the continued hearing. The Applicant strongly argues that the second hearing should be in July, 2017. It states: "[H]olding an additional hearing date in July instead of September would significantly reduce the burden on the Applicant associated with the delay, bring some balance to the fairness accorded to the Fennells and to the Applicant." Exhibit 53. It urges that a September hearing could mean that the Council may not act on the application until 2018, increasing the Applicant's financial costs. Exhibit 53.

While the cost to the Applicant is certainly a consideration in this case, it must be balanced against the ramifications of the lack of notice. Under OZAH's Rules, a continued hearing may be scheduled with only 10 days advance notice. However, the signs notifying the general public about the application are generally posted at least 120 before the public hearing. *Zoning Ordinance,* §§59-7.3.1.C; 59-7.5.2.C. There is no indication in this case how long the signs have been down.

On balance, the Hearing Examiner finds that 10 days advance notice of the hearing is insufficient in light of the fact that there is no solid evidence that the signs were posted on a

[1] The Hearing Examiner takes no position on whether the Spring Lawn Farms was entitled to receive written notice of the public hearing. If the association was not, then the sign posting would have been the primary means of notice.

substantially continuously basis and the homeowners associations do not generally meet during the summer. As a result, and after consultation with both the Applicant and Mrs. Fennell, the Hearing Examiner will schedule a public hearing for Monday, September 11, 2017, promptly after the last summer holiday.[2] Notice of the public hearing will be mailed separately from this Order.

For the foregoing reasons, the Hearing Examiner hereby orders that (1) Mr. and Mrs. Fennell be made a party to this case, (2) the hearing in this case be continued to Monday, September 11, 2017, and (3) the close of the record is extended to a time to be announced at the end of the hearing in this case.

Issued this 3rd day of July, 2017.

Lynn A. Robeson
Hearing Examiner

COPIES TO:

Francoise M. Carrier, Esq.
Mr. and Mrs. Walt Fennell
Mr. and Mrs. F. Meyer
Elsabett Testfaye, Planning Department

[2] In addition, the Hearing Examiner has surgery scheduled the last week of July and the second week of August, as well as several out-of-town post-operative appointments during the week following each surgery. She is reluctant to schedule a hearing of such interest when complications from the surgery may require her to cancel a hearing during that time. If cancelled, the hearing could be delayed much farther into the future than September 11, 2017.